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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

IN RE: PHILIP WISCHKAEMPER and GARY A. TAYLOR,

Petitioners.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does 21 U.S.C. §848(q) afford a federal habeas corpus petitioner, who was sentenced to death by a state court, the right to appointed counsel in state clemency proceedings?

2. Does 21 U.S.C. §848(q) provide the right to appointed counsel for successor post-conviction proceedings in state and federal court, particularly where a lawyer for a death-sentenced prisoner uncovers evidence of actual innocence?

3. May a district court order appointed counsel to refund attorneys' fees previously approved and paid to him, without notice or a hearing of any kind?

4. Under the Federal Rules of Appellate Procedure and the Due Process Clause of the Fifth Amendment, may a court of appeals decide the merits of an appeal without permitting the appellant to file a brief, argue the case, or even identify the issues before the court?

LIST OF PARTIES

This petition seeks review of a decision denying the right to appointed counsel and to attorneys' fees in clemency and related proceedings, as well as an order to repay already-approved fees. Petitioners Philip Wischkaemper and Gary A. Taylor were appointed as counsel for a federal habeas corpus capital petitioner, Odell Barnes, Jr. The appointments were pursuant to a federal statute, 21 U.S.C. §848(q). Mr. Barnes was eventually executed by the State of Texas.

The respondent below was Gary L. Johnson, then the Director of the Texas Department of Criminal Justice, Institutional Division. Pursuant to Supreme Court Rule 35.3, Janie Cockrell, the new Director of the Texas Department of Criminal Justice, Institutional Division, should be substituted in place of her predecessor, Gary L. Johnson.

Though not named as parties below, at the suggestion of the Clerk of this Court, counsel is serving this petition upon the United States Solicitor General and the Clerks of the United States District Court for the Northern District of Texas and the United States Court of Appeals for the Fifth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The unpublished order of the United States Court of Appeals for the Fifth Circuit in *Barnes v. Johnson; In re: Wischkaemper and Taylor*, No. 01-10576 (5th Cir. Jan. 4, 2002), is Appendix A to the petition (App. 1a, *infra*). The unpublished order of the United States District Court is Appendix C to the petition (App. 5a, *infra*).

JURISDICTION

On April 9, 2001, the district court ruled that an appointment of counsel under 21 U.S.C. §848(q) does not authorize state clemency representation. *See* App. 5a. On July 20, 2001, the United States Court of Appeals for the Fifth Circuit dismissed the appeal for lack of jurisdiction. *See* App. 3a. On January 4, 2002, the court granted rehearing, vacated the earlier order of dismissal, and decided the merits of the appeal. *See* App. 1a-2a. Petitioners sought rehearing en banc, which was denied on February 5, 2002. *See* App. 8a-9a.

The district court had jurisdiction over the appointment and compensation of counsel pursuant to 21 U.S.C. §848(q) and had jurisdiction over the underlying federal habeas corpus petition pursuant to 28 U.S.C. §2254(a). The court of appeals had jurisdiction pursuant to 28

U.S.C. §1291. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

Relevant portions of 21 U.S.C. §848(q) are reprinted as Appendix E, *infra*, at App. 10a.

STATEMENT OF THE CASE

Odell Barnes was convicted of capital murder and sentenced to death. After the conclusion of state post-conviction proceedings, the United States District Court for the Northern District of Texas appointed Mr. Wischkaemper and Mr. Taylor to represent Mr. Barnes, pursuant to 21 U.S.C. §848(q). *See* App. 18a.

Mr. Wischkaemper and Mr. Taylor filed a habeas corpus petition in the district court, which was denied. *See* App. 27a. Section 848(q)(8) provides that an attorney appointed in a federal habeas corpus case "*shall* represent the defendant throughout every subsequent stage of available judicial proceedings, including . . . motions for new trial, appeals, [and] applications for writ of certiorari to the Supreme Court of the United States . . . ." *Id.* (emphasis added). Counsel sought to appeal to the United States Court of Appeals for the Fifth Circuit, which denied a certificate of appealability. *See Barnes v. Johnson*, 184 F.3d 816 (5th Cir. 1999) (table); App. 27a-28a. Counsel filed a petition for a writ of certiorari, which was

denied on November 1, 1999. *See Barnes v. Johnson*, 528 U.S. 974 (1999); App. 28a.

Section 848(q)(8) additionally commands that federally-appointed habeas counsel "*shall* represent the defendant throughout . . . all available post conviction process, . . . and *shall* also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant." *Id.* (emphasis added). As the habeas corpus case progressed through the federal system, Mr. Wischkaemper and Mr. Taylor developed evidence of Mr. Barnes' actual innocence. This included: evidence that a state's witness admitted involvement in the murder; scientific evidence that countered the state's theory of sexual assault; expert evidence that blood found on Mr. Barnes' clothes was tainted; information that a state's witness had been given a highly favorable plea agreement and an early release from probation; and evidence that the fingerprints of a state's witness were found on the murder weapon. *See* App. 18a-19a. A group of French citizens provided funds for an investigation (though not for counsel). *See id.* The evidence of actual innocence formed the basis of the clemency application, as well as successor state and federal habeas corpus petitions.

Counsel filed an extensive clemency application on behalf of Mr. Barnes to the Texas Board of Pardons and Paroles. *See* App. 20a. Petitioners filed several supplements, met in-person with representatives of the Governor of Texas, and continued a dialogue with the Governor's office up to the time of execution. Clemency was denied. *See id.* Counsel also sought leave to file a successor petition in state court, which was denied on

February 16, 2000 by the Texas Court of Criminal Appeals. Counsel asked the U.S. Court of Appeals for leave to file a successor federal petition, which was denied on February 25, 2000, and they filed an original petition for writ of habeas corpus with a stay application in this Court. *See* Petition for Writ of Habeas Corpus filed as an Original Matter, *In re: Odell Barnes, Jr.*, No. 99-8449 (U.S.) (filed Feb. 26, 2000), at 3. On March 1, 2000, this Court denied Mr. Barnes' original petition and his application for a stay of execution. *See In re: Odell Barnes, Jr.*, 529 U.S. 1001 (2000)). Mr. Barnes was executed. *See* App. 3a.

Mr. Taylor and Mr. Wischkaemper submitted their vouchers to the court of appeals. *See* App. 13a-16a. They billed only for a fraction of the hundreds of hours that they devoted to the case. *See* App. 13a, 20a-21a. Under Fifth Circuit authority, they could not seek reimbursement for state successor representation. *See Sterling v. Scott*, 57 F.3d 451 (5th Cir. 1995). Mr. Wischkaemper and Mr. Taylor sought to exclude from the vouchers the time devoted solely to the successor litigation. *See* App. 20a-21a.[1] Counsel explained that none of the attorneys

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[1] Current counsel of record has reviewed Mr. Wischkaemper's and Mr. Taylor's vouchers and timesheets. While the record is not entirely clear, it appears that the overwhelming number of hours for which they billed were devoted to the state clemency representation or to investigative and research efforts that furthered the clemency application and the successor litigation concurrently. If it is necessary to distinguish clemency and concurrent successor representation, a remand would be appropriate. In addition, current counsel has noted several hours that should be attributed *solely* to the successor litigation, and which were included inadvertently. Because it was not the

was compensated for their work other than by the courts. *See* App. 19a. The court of appeals approved payments for Mr. Wischkaemper and Mr. Taylor for fees and expenses from the filing of notice of appeal until the petition for writ of certiorari was filed in the Supreme Court. *See* App. 22a. The court of appeals told counsel that "[t]he time and expenses claimed for the clemency proceedings should be submitted to the district court for approval." *See id.*

Mr. Wischkaemper submitted his voucher to the district court, which approved it on August 7, 2000. *See* App. 6a, 23a, 28a. Mr. Taylor subsequently submitted his voucher. *See* App. 25a. On April 9, 2001, without notice or a hearing, the district court issued an order denying Mr. Taylor compensation related to state clemency proceedings, vacating the prior payment to Mr. Wischkaemper, and ordering Mr. Wischkaemper to repay the previously distributed fees, citing *Chambers v. Johnson*, 133 F. Supp. 2d 931 (E.D. Tex. 2001). *See* App. 5a-7a, 28a-29a. *Chambers*, which was decided in March 2001, holds that an appointment of counsel under §848(q) does not include state clemency representation. *See id.*, 133 F. Supp. 2d at 934-36. The district court did not address counsels' representation of Mr. Barnes on either the state or federal successor petitions.

Counsel appealed the district court's ruling to the United States Court of Appeals for the Fifth Circuit. On July 20, 2001, the court of appeals dismissed the appeal

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lawyers' intent to include these hours, Mr. Wischkaemper and Mr. Taylor would withdraw any claim for them.

for lack of jurisdiction (*see* App. 4a) before any briefs could be filed. Counsel sought reconsideration, argued that the court had jurisdiction, and pointed out that this appeal involves both a denial of compensation and an order requiring repayment of fees. *See* App. 31a-32a. On January 4, 2002, the panel granted rehearing on the jurisdictional issue and vacated the order of dismissal, but then summarily affirmed the district court. *See* App. 1a-2a. Without briefing or argument, the circuit affirmed on the basis of *Clark v. Johnson; In re: Taylor and Harris*, 278 F.3d 459 (5th Cir. 2002), *pet. for cert. filed* (April 25, 2002) (No. 01-1605), which held that an order of appointment under §848(q) does not include state clemency representation. The *Clark* panel noted that the circuit "has continued to construe §848(q)(4)(B) narrowly." *Clark*, 278 F.3d at 462 (citing *Cantu-Tzin v. Johnson*, 162 F.3d 295, 298-99 (5th Cir. 1998)). It concluded "that the phrase 'proceedings for executive or other clemency as may be available to the defendants' as it appears in §848(q)(8) does not apply to state clemency proceedings." *Id.* at 462-63. The court in *Clark* failed to cite or address the contrary decision from the Eighth Circuit, *Hill v. Lockhart*, 992 F.2d 801 (8th Cir. 1993), or published district court decisions that follow *Hill*.

Mr. Wischkaemper and Mr. Taylor sought rehearing en banc, which was denied on February 5, 2002. *See* App. 8a-9a.

REASONS FOR GRANTING THE PETITION

1. The Fifth Circuit's erroneous interpretation of 21 U.S.C. §848(q) conflicts with the ruling of the Eighth Circuit and several district courts, is contrary to *McFarland v. Scott*, and should be reviewed by this Court.

a. Section 848(q) plainly requires the appointment of counsel for clemency proceedings.

In 1988, Congress passed the Anti-Drug Abuse Amendments Act ("ADAA"), Pub. L. 100-690, Title VII, §7001, 102 Stat. 4393-94, which establishes a right to counsel for state death-sentenced prisoners who seek federal habeas corpus review. In addition, the statute plainly provides for counsel in clemency proceedings, which typically arise near the conclusion of the federal habeas corpus litigation. Congress made clear that people sentenced to death should not be abandoned by their lawyers as an execution date nears.

In construing §848(q), this Court must "begin, as always, with the language of the statute." *Duncan v. Walker*, 533 U.S. 167, 172 (2001) (citations omitted). The 1988 Act added 21 U.S.C. §848(q)(4)(B), which provides,

> "In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9)."

The referenced paragraph 8 states, in turn:

> *"Unless replaced by similarly qualified counsel . . . , each attorney so appointed* shall represent the defendant through every subsequent stage *of* available judicial proceedings, . . . and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, *and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant."*

21 U.S.C. §848(q)(8) (emphasis added). Another paragraph, §848(q)(10)(A), furnishes compensation "to attorneys appointed under this subsection" at a fixed hourly rate. Subsection 848(q)(10)(B) provides expenses for other reasonably necessary services.

Under the plain language of this statute, appointed and compensated counsel must be afforded to a capital habeas corpus petitioner for state clemency representation. Section 848(q)(4)(B) requires the appointment of counsel in any capital proceeding under §2254 – meaning in any capital federal habeas corpus petition filed by a state prisoner – and in the related proceedings described in §848(q)(8). Section 848(q)(8) provides that, once appointed, the habeas corpus lawyer *shall* represent the capital defendant in such "proceedings for executive or other clemency as may be available to the defendant." This duty must encompass *state* clemency proceedings because the statutory right to counsel includes, without limitation, "such" clemency proceedings "as may be available" and the *only* clemency proceedings "available" to a defendant convicted in a state court are those that are provided by the state.

Where, as here, the language of the statute is clear, that language must control. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Thus, the Eighth Circuit correctly ruled in *Hill v. Lockhart*, 992 F.2d 801 (8th Cir. 1993) that "[t]he plain language of §848(q) evidences a congressional intent to insure that indigent state petitioners receive 'reasonably necessary' competency and clemency services from appointed, compensated counsel." *Id.* at 803.

There are other reasons why the Eighth Circuit was correct. The statute expressly refers to "proceedings for executive or *other* clemency . . . ." §848(q)(8) (emphasis added). Federal clemency is purely executive.[2] Although the clemency power "has gravitated toward the executive over time" (*see Herrera v. Collins*, 506 U.S. 390, 414 (1993)), a number of states permit the legislative or judicial branches to control or participate in the clemency process.[3] The inclusion of the phrase "other clemency" plainly shows that Congress intended §848(q) to include

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[2] *See* U.S. CONST., art. II, §2, cl. 1. The federal clemency power is not even subject to modification by the legislative branch. *See Schick v. Reed*, 419 U.S. 256, 266 (1974); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866).

[3] A single example may suffice. In Connecticut, the clemency power is reposed in the legislative, rather than the executive branch. As that state's highest court has recognized, "[i]n Connecticut, the pardoning power is vested in the legislature . . . which has delegated its exercise to the board of pardons." *McLaughlin v. Bronson*, 537 A.2d 1004, 1006-07 (Conn. 1988) (citations omitted).

state clemency proceedings. Courts must "generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) (citation omitted). Moreover, limiting the statute to federal clemency would make the word "other" superfluous. A court must "give effect, if possible, to every clause and word of a statute." *Duncan*, 533 U.S. at 174 (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (internal quotations omitted)); *(Terry) Williams v. Taylor*, 529 U.S. 362, 404 (2000) (same).

b. The circuits are split.

The erroneous rulings of the Fifth Circuit directly conflict with decisions from the Eighth Circuit and several district courts. This Court should grant review to resolve the split in authority.

As already noted, in *Hill v. Lockhart*, the Eighth Circuit found that the plain language of §848(q) affords clemency counsel to state prisoners sentenced to death. *Hill*, 992 F.2d at 803. Although that circuit would require counsel to follow certain procedural steps,[4] the opinion can only be read to hold that §848(q) establishes the right

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[4] The court noted that for counsel's services to be considered "reasonably necessary," the district court must be satisfied that the underlying federal habeas proceeding is non-frivolous and that state law provides no funds for clemency or competency representation. Counsel should also seek permission prior to beginning the work. *See Hill*, 992 F.2d at 803. In so ruling, the *Hill* court relied on a part of the statute that has now been amended.

to appointed counsel in clemency proceedings, even when those proceedings are convened under the authority of the state. Two district courts outside of Texas have acknowledged the split and have followed *Hill*. *See Lowery v. Anderson*, 138 F. Supp. 2d 1123, 1125 (S.D. Ind. 2001) (granting a motion for appointment of counsel for state clemency representation, finding "the plain language of §848(q)(8) to be controlling here, consistent with the straightforward and persuasive reasoning of the Eighth Circuit in *Hill*."); *Strickler v. Greene*, 57 F. Supp. 2d 313, 316 (E.D. Va. 1999) (concluding that *Hill* is "the better-reasoned appellate decision on this topic" and agreeing that "the statutory text authorizes compensation" for clemency representation.)[5]

The Fifth Circuit reached the opposite conclusion in *Clark*, which formed the basis for the ruling in this case. Instead of following the plain language of the statute, the panel in *Clark* decided that §848(q)(4)(B) should be construed narrowly. *See Clark*, 278 F.3d at 462. The court concluded that §848(q)(8) "does not apply to state clemency proceedings." *Id.* at 463. In addition, the Eleventh Circuit *may* have determined that §848(q) does not require the appointment of federal counsel to raise an unexhausted competency claim in state court. *See In re:*

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[5] Further, though it is not a judicial decision, the Fourth Circuit affirmatively instructs appointed capital habeas corpus counsel that it compensates for "all time spent representing the client on appeal, after filing of the notice through preparation for writ of certiorari, and completion of any applicable clemency proceedings." *Payment of Court-Appointed Counsel in Appeals Arising Out of State Capital Convictions*, available at: http://www.ca4.uscourts.gov (last visited April 11, 2002).

Lindsey, 875 F.2d 1502 (11th Cir. 1989). The holding in *Lindsey* is not entirely clear because that court first ruled that no properly filed habeas corpus petition was before the federal court, and thus no right to federal assistance under §848(q) could have attached at all. *See id.* at 1506. Even so, the *Lindsey* court went on to declare that it could not agree that " 'proceedings for executive or other clemency,' as used in subsection 848(q)(8), encompass . . . any proceedings convened under the authority of a State." *Id.*

In sum, there is no doubt that the Fifth and the Eighth Circuits have reached opposite conclusions about the requirements of §848(q). There is no way to reconcile the two holdings. And although *Lindsey*'s holding is difficult to determine, it appears that the Eleventh Circuit is aligned with the Fifth.

The split between the Fifth and Eighth Circuits will not be resolved without direction from this Court. On both sides of the divide are jurisdictions that regularly carry out the death penalty, particularly if one also takes into account the rulings of the district courts in Indiana and Virginia and the Eleventh Circuit's decision in *Lindsey*. Here is the tally of the states for which federal courts have ruled whether death-sentenced prisoners have a right to federally-appointed counsel in state clemency proceedings, together with the number of people (in parentheses)[6] that these states have executed since the reinstatement of the death penalty in 1976:

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[6] *See* Death Penalty Information Center, *Number of Executions By State Since 1976*, available at: http://www.deathpenaltyinfo.org/dpicreg.html (last visited May 1, 2002).

Right to counsel under §848(q)	*No right to counsel under §848(q)*
Virginia (85)	Texas (266)
Missouri (57)	Florida (51)
Arkansas (24)	Georgia (29)
Indiana (9)	Louisiana (26)
Nebraska (3)	Alabama (23)
	Mississippi (4)

This list contains eight of the ten states that have executed the most people since 1976; only Oklahoma (50) and South Carolina (25) are not represented. Thus, there is no reason to wait for the issue to percolate in the lower courts because the most active death penalty jurisdictions have already weighed in. Where Congress has plainly required counsel to be provided for state clemency representation, the availability of federally-appointed counsel ought not depend upon whether a person faces death in Virginia, Missouri or Arkansas, instead of Texas, Florida or Georgia.

c. The Fifth Circuit's narrow reading of 21 U.S.C. §848(q) runs counter to the teachings of this Court in *McFarland v. Scott*.

In *McFarland v. Scott*, 512 U.S. 849 (1994), this Court held that the language and purpose of §848(q)(4)(B) establish that the statutory right to counsel encompasses legal representation in preparing a capital federal habeas corpus petition. *See id.* at 856. Section 848(q) should be construed "in light of its related provisions" to "give[ ] meaning to the statute as a practical matter." *Id.* at 854, 855. Emphasizing the importance of ensuring appointed counsel to indigent defendants in capital proceedings,

"Congress' provision of a right to counsel under §848(q)(4)(B) reflects a determination that quality legal representation is necessary in capital habeas corpus proceedings in light of 'the seriousness of the possible penalty and . . . the unique and complex nature of the litigation.' " *Id.* at 855 (quoting 21 U.S.C. §848(q)(7)). Examining the express language of the statute and informed by these considerations, the Court concluded that a "post conviction proceeding" within the meaning of §848(q)(4)(B) is commenced by filing a motion for appointment of counsel. *See id.* at 856-57. In *Clark*, the Fifth Circuit – without citing to *McFarland* – applied a self-derived rule that §848(q) must be construed narrowly. *See Clark*, 278 F.3d at 462. But neither *McFarland* nor any circuit decision stands for the proposition that §848(q), in contrast to all other statutes, must be construed narrowly. Had the Fifth Circuit panel in *Clark* followed *McFarland*, it would have focused on the plain language of §848(q) and sought to give practical meaning to the statute as a whole.

Clemency is a critical part of our criminal justice system, and is particularly vital when the state seeks to take a human life. Clemency is "an act of grace" (*United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833)), or an exercise of mercy or justice; it is "the 'fail safe' in our criminal justice system." *Herrera v. Collins*, 506 U.S. 390 at 415 (citation omitted). As a discretionary, fail safe measure, clemency is typically sought "downstream" from state and even federal habeas corpus litigation. It is "traditionally available to capital defendants as a *final* and alternative avenue of relief." *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 284 (1998) (Opn. of Rehnquist, C.J.)

(emphasis added). Given clemency's function as a fail safe procedure that is generally sought late in the process, clemency representation is logically part of a system of the appointment of federal habeas corpus counsel.

Had the Circuit sought to give meaning to the entire statute, it would have determined that affording counsel for clemency proceedings serves the essential purpose of §848(q). Through the plain language of the statute, Congress affirmed that a defendant should continue to be represented by counsel as an execution date nears. Clemency proceedings are unique and important, requiring highly skilled legal assistance. Clemency applications are often intertwined with the merits of the underlying habeas corpus litigation,[7] requiring the assistance of counsel who have knowledge of both the "complex nature" of post-conviction practice (*see McFarland*, 512 U.S. at 855; §848(q)(7)) and a command of the facts of the individual case. However, instead of looking at the plain language of the law, informed by its purpose, the Fifth Circuit set out to interpret §848(q) as narrowly as it could. This construction is counter to the principles of *McFarland*, ignores the purposes of the statute, and ought to be reviewed by this Court.

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[7] *See, e.g., Herrera v. Collins*, 506 U.S. at 411-12 ("Clemency . . . is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."); *Thompson v. Oklahoma*, 487 U.S. 815, 876 (1988) (Scalia, J., joined by Rehnquist, C.J., and White, J.) ("The Governor of Oklahoma, who can certainly recognize a frustration of the will of the citizens of Oklahoma more readily than we, would certainly have used his pardon power if there was some mistake here.")

d. The issue is exceptionally important.

The Fifth Circuit's ruling is now the law in capital proceedings that arise in Texas, Mississippi and Louisiana. All three are death penalty states, though Texas has executed more people than any other state in the last quarter-century. It has put 266 individuals to death, fully one-third of all executions in the United States since 1976.[8] Texas has already administered lethal injections to ten people in the first four months of this year, and it has twelve more executions scheduled between May 1 and June 26.[9]

Without the right to federally-appointed counsel, many indigent people will go to their deaths without seeking clemency, for no other reason than they cannot afford to hire a lawyer to make a final plea for mercy and grace. Of the eleven states listed in the table in this petition, only Florida provides a statutory right to counsel in clemency proceedings.[10] Some lawyers appointed

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[8] *See Number of Executions By State Since 1976, supra* note 6.

[9] *See* Death Penalty Information Center, *Upcoming Executions*, available at: http://www.deathpenaltyinfo.org/executionalert.html (last visited May 1, 2002).

[10] *See* FLA. STAT. §925.035(4) (providing funds up to $1,000 for clemency representation); FLA. STAT. §925.036; *Remeta v. Florida*, 559 So.2d 1132 (Fla. 1990) (courts have authority to compensate beyond the $1,000 cap). Counsel have located no statutes that provide for compensation of counsel in clemency proceedings in the other ten states. In *Strickler v. Greene*, the district court noted that Virginia does not compensate counsel for clemency representation. *See id.*, 57 F. Supp. 2d at 314. The court in *Lowery v. Anderson*, 138 F. Supp. 2d at 1125, made the same observation about Indiana law.

under §848(q) may prepare clemency applications *pro bono*, but others will not. Many death row inmates are poorly educated,[11] retarded,[12] or mentally ill,[13] wholly unable to marshal the materials necessary to file their own clemency applications. They will be executed without clemency review.

We do not have to speculate to know that this is true.

Lawyers in a public defender office or other publicly-funded organization may provide clemency representation pursuant to contract or agreement, but there does not appear to be a right under state law to such representation in these other ten states, nor would any such contract or agreement help defendants represented by appointed private counsel.

[11] The U.S. Department of Justice reports that 14.4% of those on death row have an education up to the eighth grade or less. Another 37.3% went beyond eighth grade but failed to graduate from high school. *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *Capital Punishment 2000*, Tbl. 7 (Dec. 2001), available at: http://www.ojp.usdoj.gov/bjs/abstract/cp00.htm (last visited April 19, 2002).

[12] *See* The Constitution Project, MANDATORY JUSTICE: EIGHTEEN REFORMS TO THE DEATH PENALTY, at 12 (2001) (reporting that persons with mental retardation make up between 12 and 20 percent of those on death row).

[13] *See* Dorothy O. Lewis, et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838, 840 (1986) (finding, in a study of fifteen adult death row inmates, that 40% (six) were chronically psychotic, evidencing symptoms such as loose, illogical thought processes, delusions and hallucinations); Nat'l Mental Health Assoc., *Death Penalty and People With Mental Illness*, available at: http://www.mha-mi.org/policy44.html (last visited April 19, 2002) (estimating that between 5 and 10 percent of people on death row have a serious mental illness).

Emerson Edward Rudd was represented by counsel appointed under §848(q). After his federal habeas corpus petition was denied and this Court denied certiorari, his counsel asked to clarify that his order of appointment included state clemency representation. The district court ruled that §848(q) does not provide compensation for state clemency applications. *See Rudd v. Johnson*, 2001 U.S. Dist. LEXIS 18315 & 18798 (N.D. Tex. 2001). This Court and the Fifth Circuit denied stays of execution. *See Rudd v. Cockrell*, 122 S.Ct. 585 (2001); *Rudd v. Cockrell*, No. 01-11437 (5th Cir. Nov. 14, 2001). Mr. Rudd went to his death on November 15, 2001, without an application for clemency being filed with the Texas Board of Pardons and Paroles.

Clemency is critical to a system that imposes the death penalty and is particularly important given recent additional restrictions on federal habeas corpus.[14] Thus, in *Herrera v. Collins*, this Court rejected a free-standing assertion of actual innocence, but underscored that Mr. Herrera could file a state application for clemency, a process "deeply rooted in our Anglo-American tradition of law." *Id.*, 506 U.S. at 411-12. Indeed there is rich irony in the ruling below. Although the Fifth Circuit held that there is no right to counsel for clemency review, the same

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[14] The Anti-Terrorism and Effective Death Penalty Act, Pub. L. 104-132, added a statute of limitations (*see* 28 U.S.C. §2244(d)), restrictions on successive petitions (*see* 28 U.S.C. §2244(b)), and new requirements of deference (*see* 28 U.S.C. §2254(d)). These provisions constrict the opportunity of state prisoners to receive federal habeas corpus relief. For many death-sentenced prisoners, clemency may provide the only available procedure to avoid execution.

court has repeatedly ruled that it is not a violation of the Constitution to execute an innocent Texas death row inmate, pointing out that the person may apply for clemency to the Texas Board of Pardons and Paroles. *See Graham v. Johnson*, 168 F.3d 762, 788 (5th Cir. 1999), *cert. denied*, 529 U.S. 1097 (2000); *Lucas v. Johnson*, 132 F.3d 1069, 1074-76 (5th Cir.), *cert. dismissed*, 524 U.S. 965 (1998). But if clemency is essential to our system of justice, the availability of that remedy must depend upon the merits of the clemency case, rather than upon the utter chance that an indigent inmate will find a volunteer lawyer willing to investigate and file a clemency application in the first place.

2. Review should be granted to ensure that appointed counsel pursue all available post-conviction remedies, particularly where counsel uncovers evidence of innocence.

During Odell Barnes' clemency investigation, Mr. Wischkaemper and Mr. Taylor discovered evidence pointing to Mr. Barnes' actual innocence. Counsel included this evidence in the clemency application, as well as in successor petitions in the state and federal courts. Because of circuit precedent, counsel did not seek compensation for the work devoted solely to the successor petitions, though they did seek compensation for work that furthered the clemency and successor efforts concurrently. *See supra* at 4, n.1. The district court and the Fifth Circuit did not specifically address counsels' activity on the successor petitions; the courts treated all of their efforts as clemency representation. *See* App. 2a, 5a. Nevertheless, representation in all available post-conviction

processes is within the scope of an appointment under §848(q)(4)(B). If this Court holds that an appointment does not include state clemency representation, then a substantial portion of counsels' efforts should still be compensated under the statute.

Section 848(q)(4)(B) commands that unless replaced, each federal habeas corpus counsel "*shall* represent the defendant *throughout every subsequent stage of available judicial proceedings, . . . and all available post-conviction processes* . . . ." (Emphasis added). The plain language of the statute provides for the appointment of counsel to represent a capital defendant in all available judicial and post-conviction processes, without distinguishing federal from state proceedings or first from subsequent habeas petitions. Congress intentionally chose unequivocal, absolute terms to define the scope of capital representation. The legislature would not have selected such all-encompassing, unqualified language unless it had intended for indigent defendants to be represented throughout every stage of post-conviction process, in every forum, until execution. This is consistent with this Court's view in *McFarland* that capital judicial proceedings are so complex and unique, and the potential penalty so grave, that thorough and complete representation of indigent defendants is necessary and provided for by §848(q). *See McFarland*, 512 U.S. at 855-56 (citations omitted).

Contrary to the plain language of the statute, however, several circuits have held that §848(q) does not include representation in successor petitions filed in state court. *See Sterling v. Scott*, 57 F.3d 451, 456-58 (5th Cir. 1995); *In re: Lindsey*, 875 F.2d 1502, 1506-08 (11th Cir.

1989).[15] These courts read the statute narrowly for policy reasons. The Fifth Circuit remarked that if the statute included representation for state claims, the cost of implementing the statute would increase enormously. *See Sterling*, 57 F.3d at 457. The court also articulated federalism concerns and expressed the view that federal funds should not subsidize state court proceedings. *See id.* The Eleventh Circuit in *Lindsey* made similar points; it feared that providing funds would encourage defendants to file frivolous, out-of-sequence petitions in federal court to secure federal counsel, only to return to state court with counsel to pursue unexhausted state claims. *See In re: Lindsey*, 875 F.2d at 1506-07.

The reasoning of the Fifth and the Eleventh Circuits is erroneous for several reasons. First, the federalism policy argument runs counter to the statute's express language, which provides counsel in all post-conviction proceedings that follow an initial federal habeas appointment, without regard to forum. "Courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so . . . ." *Brogan v. United States*, 522 U.S. 398, 408 (1998) (interpreting 18 U.S.C. §1001 according to its plain language, despite policy reasons that might favor an "exculpatory no"

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[15] These same circuits subsequently clarified their positions to hold that §848(q) does ensure counsel for *federal* successor petitions, at least those relating to competency. *See Weeks v. Jones*, 100 F.3d 124, 128 (11th Cir. 1996); *Barnard v. Collins*, 13 F.3d 871, 878-79 (5th Cir. 1994).

In dicta, the Eighth Circuit agreed with *Lindsey* with respect to unexhausted state claims, but distinguished clemency and competency proceedings. *See Hill*, 992 F.2d at 803.

limitation). Moreover, consistent with *McFarland v. Scott*, the overriding policy concern of §848(q) is that capital proceedings are grave and complex, and indigent capital defendants must have competent, consistent representation in their post-conviction efforts. Where, as here, the same investigation supports the clemency application and state and federal successor petitions, it only makes sense that the same lawyer serve as counsel in all of these matters. A federally-appointed attorney who uncovers critical evidence during the federal habeas process should pursue available state court remedies. Finally, the concern – perhaps expressed most strongly in *Lindsey*, 875 F.2d at 1506-07 – that defendants would file frivolous, out-of-sequence federal petitions, merely so that they could obtain appointed counsel and then return to state court to exhaust their remedies, is surely insubstantial in the wake of the Anti-Terrorism and Effective Death Penalty Act, Pub. L. 104-132, which makes it perilous to circumvent the state post-conviction process.[16]

This Court should grant review to resolve this issue. In §848(q), Congress spoke in unmistakable terms. The circuits, however, have not followed the plain language of this statute. Although the courts below did not address the question, this Court should make clear that appointed counsel can and should pursue all available post-conviction remedies, whether those remedies are in state or federal court. This duty is most critical where, as here,

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[16] *See* 28 U.S.C. §2244(d) (severely restricting successor petitions); §2254(e) (restricting the availability of federal evidentiary hearings when the applicant has failed to develop the facts in state fora).

evidence of actual innocence surfaces during the federal habeas corpus litigation.

3. The district court erred in ordering repayment of fees without notice or a hearing.

The district court erred by ordering Mr. Wischkaemper to repay his earned fees, without affording him notice or an opportunity to be heard. Once the funds had actually been disbursed to Mr. Wischkaemper, he gained a constitutionally-protected property interest in that money and the court could not order him to relinquish it without according him due process of law.

There can be no doubt that attorneys fees are property, protected by the Fifth Amendment's Due Process Clause. This Court's precedents "establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 48 (1993); *see also Dusenbery v. United States*, 122 S.Ct. 694, 699 (2002) (quoting *James Daniel Good*, and examining the notice given following a seizure of cash). Mr. Wishkaemper earned his fees by providing legal services.[17] In *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969), this Court ruled that an individual's wages could not be garnished without notice and a

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[17] This case does not present the sort of "extraordinary situation," such as a forfeiture proceeding, where property may initially be seized without notice or hearing. Requiring a hearing prior to a forfeiture seizure would make the customs process unworkable. *See United States v. $8,850*, 461 U.S. 555, 562 n.12 (1983).

prior hearing. *See id.* at 341-42; *see also Furlong v. Shalala*, 156 F.3d 384, 393 (2d Cir. 1998) (professionals who provide services under federal Medicare program have a property interest in reimbursement for their services); *Williams v. Texas Tech Univ. Health Sciences Ctr.*, 6 F.3d 290, 293 (5th Cir. 1993) ("An expectation of employment carries with it some protected expectations as to a salary"), *cert. denied*, 510 U.S. 1194 (1994). The broad due process protection afforded to earnings has been specifically applied to repayment of attorneys' fees. For example, a court may not require a person to repay the state for the cost of their indigent criminal defense without notice and a meaningful opportunity to be heard. *See, e.g., Alexander v. Johnson*, 742 F.2d 117, 124 (4th Cir. 1984) (citations omitted).

Moreover, the district court's order that Mr. Wischkaemper pay $4,995.46 to the courts functioned as a money judgment. *See In re: ROPT Ltd. Partnership*, 209 B.R. 144, 151 n.9 (1st Cir. BAP 1997) (holding that an order to repay certain funds to the bankruptcy estate "operated as a money judgment"); *Chelsea Community Hospital, SNF v. Michigan Blue Cross Ass'n*, 630 F.2d 1131, 1136 (8th Cir. 1980) (noting that ordering Blue Cross to pay certain reimbursable costs was "in essence" a money judgment against the United States). A bedrock principle of law is that a judgment is invalid without notice and a meaningful opportunity to be heard. *See, e.g., Nelson v. Adams USA, Inc.*, 529 U.S. 460, 466-68 (2000) (district court erred in amending judgment to add a party in his individual capacity, without affording him an opportunity to show why he should not be personally liable).

In this case, there was no notice at all of the district court's proposed action, nor was there any opportunity to be heard. The district judge entered his order *sua sponte*. Mr. Wischkaemper was not allowed to show that his work was required by the statute, or that an order of repayment would amount to a hardship. Nor could he challenge the legal basis for the court's ruling. Here the district court cited no authority at all for its order, stating only that it had conducted a "post-audit" of Mr. Wischkaemper's voucher. *See* App. 5a-6a. Of course, "[t]he opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 546 (1985). In summarily ordering a repayment of funds, the district court violated the Due Process Clause, and this Court ought not allow the order to stand.

4. Under the Federal Rules of Appellate Procedure and the Due Process Clause of the Fifth Amendment, a court of appeals cannot decide the merits of an appeal without permitting the parties to file a brief, argue, or otherwise identify the issues before the court.

The petitioners appealed the district court's ruling. The Fifth Circuit decided the appeal without allowing the petitioners an opportunity to file a brief on the merits, argue the case, or even identify the issues involved. The panel initially dismissed the case for lack of jurisdiction, before an opening brief could be filed. The court later granted rehearing and determined that the jurisdictional dismissal was incorrect, but then simply proceeded to

decide what it thought were the merits, applying *Clark v. Johnson*. However, the parties were never permitted to file a merits brief and so the court did not appreciate that the appeal also raised the issue of the order of repayment. Counsel then filed a second rehearing petition, explaining that the merits ruling was erroneous, that the appeal included an additional issue, and that the case should be heard en banc. Rehearing was denied. The denial of such a basic opportunity to be heard runs afoul of the Federal Rules of Appellate Procedure and the Fifth Amendment's Due Process Clause, and should be reviewed by this Court.

The Federal Rules of Appellate Procedure do not provide for summary decisions on the merits. Rather, taken in their entirety, the rules seek to ensure that the parties have a meaningful opportunity to frame the issues and present the relevant facts and law. Thus, Rule 34 provides:

> "Oral argument *must* be allowed in every case unless a panel of three judges who have *examined the briefs* and record unanimously agrees that oral argument is unnecessary for any of the following reasons: (A) the appeal is frivolous; (B) the dispositive issue or issues have been authoritatively decided; or (C) the facts and legal arguments are *adequately presented in the briefs* and record, and the decisional process would not be significantly aided by oral argument."

FED. R. APP. P. 34(a)(2) (emphasis added). By providing that oral arguments "must be allowed" unless judges have read the briefs and made certain limited findings,

the rules make clear that briefing must always be permitted and that argument is indeed the norm. *See also* FED. R. APP. P. 31(a)(2) (allowing the court to shorten the time allowed for briefing the merits, but saying nothing about eliminating briefs altogether); FED. R. APP. P. 38 (giving an appellant a "reasonable opportunity to respond" before costs and damages can be awarded for filing a frivolous appeal).

The summary procedures of the court below also violated petitioners' due process rights under the Fifth Amendment. "The Court traditionally has held that the Due Process Clauses protect civil litigants, who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress their grievances." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). In *Logan*, this Court found that the plaintiff's right to use Illinois' Fair Employment Practices Act's adjudicatory procedures was a species of property, protected by the Due Process Clause. *See id.* at 430-31. Here, the petitioners' cause of action, their appeal, was a protected form of property.

Once the Due Process Clause is triggered, the Fifth Amendment "impose[s] 'constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause.' " *Logan*, 455 U.S. at 429 (quoting *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958)). "Notice and an opportunity for hearing" is especially important when a person is being deprived of their livelihood. *See Loudermill*, 470 U.S. at 542-43 (1985) (the Due Process Clause requires that a government employee be allowed some kind of

hearing before being discharged). Although the petitioners filed a second rehearing petition and asked the Fifth Circuit to reconsider its rulings en banc, an after-the-fact rehearing petition is no substitute for a before-the-fact opening brief. In *Armstrong v. Manzo*, 380 U.S. 545 (1965), this Court held that a state violated due process by entering an adoption order without notice. *See id.* at 550. The constitutional harm was not ameliorated by affording the aggrieved parent a hearing afterwards because he then had to shoulder the affirmative burden of overcoming the prior decree. *See id.* at 551. Indeed, the Fifth Circuit admits that it does not favor petitions for rehearing en banc, calling them "the most abused prerogative," and noting that they are granted in fewer than 1% of cases. *See* U.S. Court of Appeals for the Fifth Circuit, Internal Operating Procedures (Petition for Rehearing En Banc), available at: http://www.ca5.uscourts.gov (last visited April 21, 2002).

Further, in summarily affirming the district court here, the circuit relied wholly on *Clark*. *See* App. 2a. Such absolute reliance suggests that a type of res judicata or estoppel may have been the basis of the court's decision. However, extreme applications of res judicata can violate the Constitution. *See Richards v. Jefferson County*, 517 U.S. 793, 797 (1996) (holding that litigants were not bound by a prior ruling in a case in which they were not adequately represented). Although one petitioner, Mr. Taylor, was a party in *Clark*, Mr. Wischkaemper was not. Indeed, it was Mr. Wischkaemper, not Mr. Taylor, who was ordered to repay his fees. And by deciding the case without briefing, the circuit deprived counsel of the opportunity to make that plain to the court.

This Court should grant review and hold that the Federal Rules and the Due Process Clause guarantee, at the least, a meaningful opportunity to present the merits of an appeal. Deciding the merits of an appeal without briefing or argument is the essence of arbitrary, uninformed decisionmaking. There can be no meaningful appeal when a court bolts the courthouse door and nails shut the mail slot.

5. The Court may consider holding this petition and granting, vacating and remanding in light of *In re: Taylor and Harris.*

A petition for writ of certiorari in *In re: Taylor and Harris (Clark v. Johnson)* (No. 01-1605) was filed on April 25, 2002, and is currently before this Court. The question presented in *Taylor and Harris* is "Does 21 U.S.C. §848(q) afford federal habeas corpus petitioners, who were sentenced to death by state courts, the right to appointed counsel in clemency and competency proceedings?" While the present case also concerns representation in successor petitions and raises serious procedural issues, the Court may consider holding this petition pending the outcome in *Taylor and Harris*. A ruling in the lawyers' favor in *Taylor and Harris* should afford relief to Mr. Wischkaemper and Mr. Taylor, without requiring any court to reach the questions about successor petitions or procedural irregularities. Moreover, the lower courts treated counsels' work for Mr. Barnes as all part of their clemency representation and did not specifically address their efforts in the successor petitions. A remand would

afford the petitioners a fair opportunity to address the scope and nature of their representation.

CONCLUSION

Petitioners respectfully request that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. Alternatively, the Court should grant the petition and remand for further proceedings in light of *In re: Taylor and Harris*.

Respectfully submitted,

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Petitioners

Berkeley, California
May 2002

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* Maria Lin and John Tanghe, law students at the University of California School of Law (Boalt Hall), assisted in preparing this petition.

APPENDIX A

(Filed January 4, 2002)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-10576

ODELL BARNES, JR.,

Petitioner,

VERSUS

GARY L. JOHNSON, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

* * *

PHILIP ALAN WISCHKAEMPER and
GARY A. TAYLOR,

Appellants.

Appeal from the United States District Court
for the Northern District of Texas
(5:98-CV-7-C)

Before JOLLY, SMITH, and WIENER, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellants' motion for reconsideration, treated as a petition for panel rehearing, is GRANTED. Appellants' motion to vacate the order of

July 20, 2001, is GRANTED. Appellants' motion to reinstate the appeal is GRANTED.

In the order of July 20, 2001, this court ruled that it "has no jurisdiction to entertain an appeal from the denial of a request for compensation under [21 U.S.C.] § 848(q)(8)." That ruling was error in light of an intervening published decision of this court, No. 01-10573, *Clark v. Johnson*, 2002 U.S. App. LEXIS 7 (5th Cir. Jan. 2, 2002). Describing the jurisdictional question as one "of first impression in this Court," the panel in *Clark* held that we have jurisdiction to review such an order. *Id.* at *5-*6.

We therefore must address the question whether the district court erred in holding that state clemency proceedings cannot be compensated under § 848(q)(8). The *Clark* panel answered that question, as well, holding that "the phrase 'proceeding for executive or other clemency as may be available to defendants' as it appears in § 848(q)(8) does not apply to state clemency proceedings." *Id.* at *10.

Accordingly, the order of the district court denying compensation for state clemency proceedings is AFFIRMED.

APPENDIX B

(Filed July 20, 2001)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-10576

ODELL BARNES, JR.

Petitioner

v.

GARY L. JOHNSON, DIRECTOR,
TEXAS DEPARTMENT OF
CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION

Respondent

PHILIP ALAN WISCHKAEMPER;
GARY A. TAYLOR

Appellants

Appeal from the United States District Court
for the Northern District of Texas, Lubbock

Before JOLLY, SMITH, and WIENER, Circuit Judges.

BY THE COURT:

The Petitioner in this death-penalty case has been executed by the State of Texas. After the execution, his appointed attorney submitted a voucher to the district court for payment. The voucher included a request for

the attorney's services and expenses in pursuing state clemency proceedings. The district court disallowed the request, finding that proceedings in a state forum cannot be compensated under 21 U.S.C. § 848(q)(8). The attorney has appealed that decision to this court.

We find that the court has no jurisdiction to entertain an appeal from the denial for a request for compensation under § 848(q)(8). Accordingly, the appeal is DISMISSED.

APPENDIX C

(Filed April 9, 2001)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

ODELL, BARNES, JR., Petitioner,	)	
v.	)	
GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division, Respondent.	)	CIVIL ACTION NO. 5:98-CV-007-C

ORDER

The Court has considered the CJA 30 Voucher dated February 7, 2001, submitted by Gary Taylor seeking payment of fees and expenses incurred in connection with the representation of Odell Barnes, Jr. in State executive clemency proceedings.

The Court has also conducted a post-audit of the CJA Voucher submitted by Philip Wischkaemper on July 24, 2000, seeking reimbursement of fees and expenses incurred in connection with his representation of Odell Barnes, Jr. in State executive clemency proceedings.

Adopting the reasoning set forth in *Chambers v. Johnson*, ___F.Supp.2d ___, 2001 WL 252811 (E.D. Tex. March 8, 2001), the Court finds:

(1) Attorney Taylor's claim for compensation and reimbursement of expenses for representing Odell Barnes, Jr. in connection with the State clemency proceedings is denied.

(2) Pursuant to the post-audit conducted by this Court of Attorney Wischkaemper's CJA 30 voucher submitted on July 24, 2000, the prior approval of fees and expenses in connection with the State clemency proceedings is vacated.

(3) Attorney Wischkaemper shall refund attorneys' fees in the amount $4,522.50 and expenses in the amount of $472.96.

It is, therefore, ORDERED:

(1) Attorney Taylor's claim for compensation and reimbursement of expenses (as shown by CJA 30 Voucher dated February 7, 2001) incurred in connection with his representation of Odell Barnes, Jr. in State clemency proceedings is denied.

(2) The prior approval of Attorney Wischkaemper's CJA 30 voucher submitted on July 14, 2000, is vacated, and Attorney Wischkaemper shall refund attorneys' fees in the amount of $4,522.50 and expenses in the amount of 472.96, for a total of $4,995.46, within ninety (90) days from the date of this Order.

(3) Attorney Wischkaemper's refund shall be in the form of cashier's check or firm check made payable to the Administrative Office of the United States Courts, and shall be delivered to Kristy Weinheimer, Deputy-in-Charge, United States District Clerk's

Office, George Mahon Federal Building, 1205 Texas Avenue, Lubbock, Texas 79401.

(4) After receipt of the refund from Attorney Wischkaemper, the Clerk's Office shall mail the refund check along with a certified copy of this Order to: Administrative Office of the United States Courts, P.O. Box 77062, Washington, D.C. 20013-7062.

SO ORDERED.

Dated April 9, 2001.

/s/ Sam R. Cummings
SAM R. CUMMINGS
United States District Judge

APPENDIX D

(Filed February 5, 2002)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-10576

ODELL BARNES JR.
Petitioner

v.

GARY L. JOHNSON, DIRECTOR,
TEXAS DEPARTMENT OF
CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION
Respondent

PHILIP ALAN WISCHKAEMPER;
GARY A. TAYLOR
Appellants

Appeal from the United States District Court
for the Northern District of Texas,
Lubbock

ON PETITION FOR REHEARING EN BANC

(Opinion 1/4/02, 5 Cir., ___, ___ F.3d ___)

Before JOLLY, SMITH, and WIENER, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge

in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
United States Circuit Judge

APPENDIX E

RELEVANT STATUTORY PROVISIONS

Title 21 U.S.C. §848(q) provides, in pertinent part:

"(4)(B) In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

* * *

"(8) Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

"(9) Upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the

sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under paragraph (10). No ex parte proceeding, communication, or request may be considered pursuant to this section unless a proper showing is made proceeding, communication, or request shall be transcribed and made a part of the record available for appellate review.

"(10)(A) Compensation shall be paid to attorneys appointed under this subsection at a rate of not more than $125 per hour for in-court and out-of-court time. Not less than 3 years after April 14, 1996, the Judicial Conference is authorized to raise the maximum for hourly payment specified in the paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay for the General Schedule made pursuant to section 5305 of Title 5 on or after such date. After the rates are raised under the preceding sentence, such hourly range may be raised at intervals of not less than one year up to the aggregate of the overall average percentages of such adjustments made since the last raise under this paragraph.

"(10)(B) Fees and expenses paid for investigative, expert, and other reasonably necessary services authorized under paragraph (9) shall not exceed $7,500 in any case, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge, if the services were rendered in connection with the case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration,

and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active circuit judge."

APPENDIX F

Law Offices of Gary Taylor
(Letterhead omitted)

April 28, 2000

Mr. Charles R. Fulbruge III, Clerk
United States Court of Appeals
ATTN: Monica Washington
600 Camp Street
New Orleans, La. 70130

Re: 98-10812 Barnes v. Johnson

Dear Ms. Washington:

Please find enclosed my final voucher in the above-referenced case and my motion to exceed the limits imposed by the Court. Moreover, as my voucher states, my motion further demonstrates that, although investigators and experts were paid by donated funds in this case, none of the lawyers were ever compensated other than through the criminal justice panel.

It is my understanding that you will receive my co-counsel's voucher shortly. I know that we have exceeded the cap set by the Court. However, this was indeed an unusual and extraordinary case with strong claims of innocence. I can assure you that the hours claimed in my voucher are in reality less than one-third of the hours I expended representing Mr. Barnes. I am further certain that such will be the case with my co-counsel as well.

I am more than happy to provide whatever information the Court may have. If you have any questions, or if I

can be of assistance in any way, please feel free to contact me at any time.

Sincerely,

/s/

Gary Taylor

GAT/

Board Certified in Criminal Law
11319 Long Branch Rd.
Austin, Texas 78736

APPENDIX G

Snuggs & Wishkaemper
(letterhead omitted)

May 6, 2000

Mr. Charles R. Fulbruge III, Clerk
United States Court of Appeals
ATTN: Monica Washington
600 Camp Street
New Orleans, La. 70130

Re: 98-10812 Barnes v. Johnson

Dear Ms. Washington

Please find enclosed my final voucher in the above referenced case. My Co-counsel, Mr. Gary Taylor, has already filed his voucher, and with it, a *Motion for Payment in Excess of the Maximum Amount Allowed Under the "Plan Under the Criminal Justice Act for Representation on Appeal"*. For your convenience, I have enclosed a copy of that Motion.

As Mr. Taylor stated in his letter, this was a most unusual case with strong claims of actual innocence that we pursued through the clemency process. You may notice that I had some travel time logged in the time sheets, however, I am not submitting any milage [sic] or expenses for that travel as I used my personal vehicle with the only expense being fuel, or used free flights that I had accumulated on Southwest Airlines.

* * *

If you have any questions or need anything further, please let me know.

Very truly yours,

Snuggs & Wischkaemper

/s/

By: Philip Wischkaemper

APPENDIX H
No. 98-10812

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ODELL BARNES, JR.,

Petitioner-Appellant

v.

GARY JOHNSON,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent-Appellee

MOTION FOR PAYMENT IN EXCESS
OF THE MAXIMUM AMOUNT ALLOWED UNDER THE
"PLAN UNDER THE CRIMINAL JUSTICE ACT FOR
REPRESENTATION ON APPEAL"

-and-

MEMORANDUM IN SUPPORT

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW GARY TAYLOR AND PHILIP WISCH-KAEMPER, attorneys appointed in the above-entitled and numbered cause, and would respectfully show the Court as follows:

I.

The undersigned attorneys were appointed by Judge Sam Cummings, United States District Court for the Northern District of Texas – Lubbock Division, to represent Mr. Barnes with [page 2] respect to his federal habeas petition under 28 U.S.C. 2254. Neither attorney represented Mr. Barnes during any of the original state proceedings.

II.

Mr. Barnes' case involved substantial claims of actual innocence. Throughout the representation before the District Court counsel investigated new claims and new evidence. The District Judge provided some funds for an investigator to assist. The District Judge was apprised of all developments. These developments included: a witness who overheard others professing to know who committed the murder – which did not include Mr. Barnes; scientific evidence which did not support the State's theory that the victim was sexually assaulted at the time of death; and evidence which refuted the State's evidence of the victim's recent acquisition of a lamp which was used as a weapon.

III.

During the period of time that this case was pending before this Court, and the U.S. Supreme Court, the investigation continued.[1] A group of citizens in France

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[1] This investigation continued to yield information: an expert demonstrated that the blood found on Mr. Barnes'

provided funds for continued investigation and expert assistance regarding the actual innocence claims. Michael Charlton, an experienced capital litigation attorney, volunteered his services as an attorney to assist the undersigned attorneys. Charlton further communicated with the French citizens. None [page 3] of the attorneys – Charlton, Wischkaemper or Taylor – were compensated for any of the legal services provided by anyone (other than the Federal District Court).

The only direct monies received by either Taylor or Wischkaemper from any third party was the reimbursement of monies which Taylor expended to the Huntsville Funeral Home to cremate Mr. Barnes' remains.

IV.

Taylor and Wischkaemper represented Mr. Barnes throughout his federal appeals, including a petition for writ of certiorari, throughout the state and federal successor habeas litigation and throughout the clemency proceedings before the Texas Board of Pardons and Paroles and the Texas Governor's Office. This litigation was extensive. The successor state writ application was in

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clothes was likely tainted; a woman swore to the involvement of her boyfriend in the murder; it was discovered that one of the integral State's witnesses received an extremely beneficial plea bargain in two drug cases, and was released from probation years early; statements were obtained that another State's witness admitted involvement in the murder; and, fingerprints of one of the State's witnesses were found on the murder weapon.

excess of 400 pages. The clemency application was even longer and included a video presentation.[2]

The clemency process in Mr. Barnes' case was extensive. Not only was the initial application extensive, but a dialog continued throughout the process between the Texas Board of Pardons and Paroles and the undersigned counsel. Counsel filed several supplements to Mr. Barnes' clemency application as even newer information became known. Even after the Texas Board of Pardons and Paroles recommended relief be denied, communication continued with the Texas Governor's office – General Counsel. Counsel met with representatives of this office on the day before Mr. Barnes' execution. Counsel continued a dialog with the Governor's office throughout the day of the execution up to and including the time of the execution when the prison received a misleading and misinformed telephone call.

V.

It is counsel's understanding that 21 U.S.C. 848(q) required counsel to represent Mr. Barnes throughout his federal appeal, writ of certiorari and clemency process. [Footnote omitted]. Therefore, counsel's time worksheets reflect time expended in these endeavors. The worksheets do not include the hundreds of additional hours which

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[2] The expenses associated with the preparation of the clemency petition are higher due to the request by the Texas Board of Pardons and Paroles for more than twenty copies of this extremely large petition, in addition to copies for the Texas Governor's Office, Mr. Barnes, and the attorneys herein.

were expended in supervision of the investigators, conferencing with experts, and research and drafting solely related to the successor state and federal writ process. Moreover, none of the hours in counsel's current claim represent any of the hundreds of hours expended by Michael Charlton.

Finally, only those expenses which were essential are included within the claims. For example, there were two weekend meetings between the attorneys and the investigators in Galveston, Texas, in order to work on Mr. Barnes' case (evaluating case for clemency [page 4] procedures, preparations of clemency matters and motions for stay, etc.). Counsel have not billed for the food, lodging, travel, etc. associated with these meetings. However, counsel does bill for postage and copying expense associated with the appellate and clemency process.

* * *

[page 5]

Respectfully submitted,

PHILIP WISCHKAEMPER
Snuggs & Wischkaemper
[address and phone omitted]
By: /s/
Philip Wischkaemper
State Bar No. 21802750

GARY TAYLOR
Law Offices of Gary Taylor
[address and phone omitted]
By: /s/
Gary Taylor
State Bar No. 19691650

APPENDIX I

United States Court of Appeals
Fifth Judicial Circuit
Staff Attorneys' Office
[seal and letterhead omitted]

June 20, 2000

Wischkaemper, Philip
Attorney at Law
915 Texas Avenue
Lubbock, TX 79401

Re: 98-10812 Barnes v. Johnson

Dear Mr. Wischkaemper:

The court has asked me to advise you of final action taken on your Criminal Justice Act voucher. Your claim has been approved for $6287.50.

You were reimbursed (50.30 hours) for your fees incurred from the time the notice of appeal was filed until the Petition for Writ of Certiorari was filed in the Supreme Court. The time and expenses claimed for the clemency proceedings should be submitted to the district court for approval.

Your voucher has been submitted to the Administrative Office of the United States Courts for payment. You will receive a check direct from that office.

Very truly yours,

ANTHONY J. BONFANTI
Senior Staff Attorney
By: /s/
Deputy Clerk

APPENDIX J

Snuggs & Wishkaemper
(letterhead omitted)

July 24, 2000

Hon. Sam Cummings
United States Federal District Judge
George Mahon Federal Building
Lubbock, Texas, 79401

Re: Odell Barnes vs. Gary Johnson; 5:98-CV-007-C

Dear Judge Cummings:

Relative to the above-referenced case you will find the following:

1. Payment voucher for the above-referenced cause;

2. A letter from the Fifth Circuit's Staff Attorney's office;

3. A *Motion for Payment in Excess of the Maximum Amount allowed under "The Plan Under the Criminal Justice Act for Payment on Appeal."*

4. A billing packet sent to the Fifth Circuit containing Exhibits "A" through "E";

As you can see from the attached letter from the Staff Attorney's Office, $6287.50 of attorney time was approved for payment. None of the submitted expenses were paid. Pursuant to the letter, the remainder of the time (60.3 hours) and the expenses for the Clemency proceedings are being presented to you for your consideration.

If there are any questions concerning these matters, please advise.

Very truly yours,
Snuggs & Wischkaemper

/s/
By: Philip Wischkaemper

APPENDIX K

Law Offices of Gary Taylor
(letterhead omitted)

February 7, 2001

Nancy Doherty
United States District Clerk
Attn: Kristy Weinheimer, Deputy in Charge
1205 Texas Avenue
221 George Mahon Federal Building
Lubbock, Texas 79401-1002

RE: Cause No. 98-CV-007: Barnes v. Johnson

Dear Ms Weinheimer:

Some time back Shirley Hartman of Judge Cummings' office returned my voucher and supporting indicia to me for revision. Please find enclosed my revised voucher and supporting documentation relating to the clemency and subsequent writ proceedings in the above-referenced case.

Because Mr. Barnes' case was extraordinary, I have further included the motion Mr. Wischkaemper and I filed in the 5th Circuit Court of Appeals as well as the letter I received from the Court. As I state to the Court of Appeals, additional funds were provided to support the investigation and scientific testing in Mr. Barnes' case. None of these funds were provided to counsel.

Although I incurred extraordinary and extensive expenses relating to this case, the only expense for which I am seeking reimbursement is the copy costs for the clemency petition. I have not claimed any mileage, office

copying, long distance, etc. (all of which were substantial).

Please accept my apologies for just now returning these materials. I am a sole practitioner and subject to the calendars of the various courts in which I appear. Since these were returned to me I have filed at least one state application for writ of habeas corpus, two federal petitions for writ of habeas corpus, and countless motions, memorandum and briefs.

I would respectfully request that you present these materials to Judge Cummings. Please advise Judge Cummings that I sincerely appreciate the trust he places in me by appointing me to represent death row inmates. If Judge Cummings requires additional information, I stand ready to comply.

If you have any questions regarding these matters, please do not hesitate to contact me.

Sincerely,

/s/

Gary A. Taylor

GAT/

Board Certified in Criminal Law
11319 Long Branch Rd.
Austin, Texas 78736

APPENDIX L

CLOSED

U.S. District Court
Northern District of Texas (Lubbock)

CIVIL DOCKET FOR CASE #: 98-CV-7

Barnes v. Director TDCJ Filed 12/18/97
Assigned to: Judge Sam R. Cummings
Demand: $0,000 Nature of Suit: 535
Lead Docket: None Jurisdiction: Federal Question
Dkt # : is 7:97-CV-00290

Cause: 28: 2254 Petition for Writ of Habeas Corpus (State)

* * *

[page 11]

6/15/98	79	ORDER granting [20-1] motion for summary judgment denying [1-1] petition dismissing petition for a writ of habeas corpus with prejudice (signed by SRC) Copies to counsel: 6/15/98 Page(s) 48 (fgf) [Entry date 06/16/98]
6/15/98	80	JUDGMENT; it is ORDERED ADJUDGED and DECREED that this case is DISMISSED WITH PREJUDICE; (See Order of even date herewith); (signed by SRC) Copies to counsel: 6/15/98 Page(s): 1 (fgf) [Entry date 06/16/98]

* * *

[page 12]

* * *

6/21/99	93	ORDER OF USCA (certified copy) Re: [84-1] appeal; failed to make a substantial showing of the denial of a constitutional

right with regard to this issue, request for COA is DENIED. (ebl)

* * *

11/12/99 – Received letter from USCA Re: Supreme Court denial of cert, no further order forthcoming (ebl) [Entry date 11/15/99] [Edit date 11/15/99]

2/28/00 94 ORDER OF USCA (certified copy); It is ordered that the motion for leave to file oversize motion for authorization to file successive petition for writ of habeas corpus is GRANTED; it is further ordered that the state's motion for leave to file appendix is DENIED as unnecessary; it is further ordered that the state's motion for leave to file a response in excess pages is GRANTED; it is further ordered that Barnes's motion for leave to file a response is DENIED; it is further ordered that the motion for leave to file a successive petition for writ of habeas corpus is DENIED; it is further ordered that the motion for stay of execution is DENIED (ebl)

8/7/00 95 CJA 30 Authorization to Pay Philip Wischkaemper $4495.46 Voucher # D2936 cc: (Signed by Judge Sam R. Cummings) (ebl) [Entry date 08/09/00]

4/9/01 96 ORDER; Attorney Taylor's claim for compensation and reimbursement of expenses (as shown by CJA Voucher dated February 7, 2001) incurred in connection with his representation of Odell Barnes, Jr. in State clemency proceedings

		is DENIED; the prior approval of Attorney Wischkaemper's CJA 30 voucher submitted on July 24, 2000, is VACATED, and Attorney Wischkaemper shall refund attorneys' fees in the amount of $4,522.50 and expenses in the amount of $472.96, for a total of $4,995.46, within ninety (90) days from the date of this Order; Attorney Wischkaemper's refund shall be in the form of a cashier's check or firm check made payable to the Administrative Office of the United States Courts, and shall be delivered to Kristy Weinheimer, Deputy-in-Charge, United States District clerk's Office, George Mahon Federal Building, 1205 Texas Avenue, Lubbock, Texas 79401; after receipt of the refund from Attorney Wischkaemper, the Clerk's Office shall mail the refund check along with a certified copy of this Order to: Administrative Office of the United States Courts, P.O. Box 77062, Washington, D.C. 20012-7062 (Signed by Judge Sam R. Cummings) Copies to counsel: 04/09/01 Page(s) 3 (ebl)
4/9/01	97	CJA 30 Authorization to Pay Gary Taylor; DENIED per Order filed 04/09/01; Voucher # D29335 (ebl)
5/1/01	98	NOTICE OF APPEAL by Plaintiff Odell Barnes Jr's attorneys re [96-1] order (ebl)
5/1/01	–	Notice of appeal and certified copy of docket to USCA: [98-1] appeal (ebl)
5/1/01	99	MOTION by plaintiff Odell Barnes Jr's attorney Philip Wischkaemper to waive supersedeas bond (ebl)

5/3/01	100	ORDER granting [99-1] motion to waive supersedeas bond; it is therefore ordered that the requirement of a supersedeas bond in this matter is waived and any funds ordered to be repaid shall be paid within ninety (90) days of any final appellate decision supporting the affirmance of the Order of the Court (Signed by Judge Sam R. Cummings) Copies to counsel: 05/03/01 Page(s) 1 (ebl)

APPENDIX M

(Filed August 2, 2001)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-10576

ODELL BARNES, JR,

Petitioner

v.

GARY JOHNSON, Director, Texas Department of Criminal Justice,

Respondent.

PHILIP ALAN WISCHKAEMPER; GARY TAYLOR,

Appellants

Appeal from the United States District Court
for the Northern District of Texas

MOTION FOR RECONSIDERATION

* * *

[page 3]

II.

ARGUMENT

The order of this Court dated July 20, 2001 holds the Court is without jurisdiction to entertain a denial of a request for compensation. Although Appellants are both

somewhat similarly situated, there are, however, two separate issues involved in the appeal. The first issue is the *denial* of compensation to both attorneys performed pursuant to their appointment to represent an indigent death row inmate. This was apparently the issue addressed by the Court in its recent July 20, 2001 order. Another issue, concerning only Wischkaemper, which was before the Court is whether the District Court may enter an order [to] appointed counsel to *repay* funds already approved and paid. The Court's order does not address the second issue.

* * *

[page 5]

* * *

Appellants respectfully pray that this court grant this motion for rehearing, reconsider its order of July 20, 2001, reinstate the appeal and order briefing on the merits of Appellant's claims.

Respectfully submitted,

PHILIP WISCHKAEMPER
Snuggs & Wischkaemper
[address and phone omitted]

By: /s/
Philip Wischkaemper
State Bar No. 21802750

GARY TAYLOR
Law Offices of Gary Taylor
[address and phone omitted]

By: /s/
Gary Taylor
State Bar No. 19691650

* * *

Supreme Court U.S.
FILED
NOV 6 2002
OFFICE OF THE CLERK

(2)

No. 01-1623

In the Supreme Court of the United States

IN RE PHILIP ALAN WISCHKAEMPER AND GARY A. TAYLOR, PETITIONERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

THEODORE B. OLSON
Solicitor General
Counsel of Record
MICHAEL CHERTOFF
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
MATTHEW D. ROBERTS
Assistant to the Solicitor General
THOMAS M. GANNON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

15 pp

QUESTIONS PRESENTED

1. Whether 21 U.S.C. 848(q) provides prisoners who were sentenced to death by state courts the right to federally appointed and funded counsel in state clemency proceedings.

2. Whether 21 U.S.C. 848(q) provides prisoners who were sentenced to death by state courts the right to federally appointed and funded counsel in successor post-conviction proceedings.

3. Whether a district court may summarily order appointed counsel to return counsel fees previously approved and paid to him.

4. Whether a court of appeals may decide an appeal without prior briefing by the appellant.

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Clark v. *Johnson*, 278 F.3d 459 (5th Cir. 2002), petition for cert. pending *sub. nom. In re Taylor*, No. 01-1605 (filed Apr. 25, 2002)	4
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Weinstein, In re, 164 F.3d 677 (1st Cir.), cert. denied, 527 U.S. 1036 (1999) 12-13
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21 U.S.C. 848(q) 1, 4, 5, 6, 7, 8, 9, 11
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In the Supreme Court of the United States

No. 01-1623

IN RE PHILIP ALAN WISCHKAEMPER AND GARY A. TAYLOR, PETITIONERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. Odell Barnes was convicted of murder in a Texas state court and sentenced to death. See Pet. 2. Following state post-conviction proceedings, and pursuant to 21 U.S.C. 848(q), the United States District Court for the Northern District of Texas appointed petitioners Philip Wischkaemper and Gary A. Taylor to represent Barnes in federal habeas corpus proceedings under 28 U.S.C. 2254. Pet. 2; Pet. App. 18a. Petitioners filed a habeas petition on his behalf. The district court denied the petition, and the district court and the court of appeals declined to issue a certificate of appealability. See *Barnes* v. *Johnson*, 184 F.3d 816 (5th Cir. 1999)

(Table); Pet. App. 27a-28a. This Court denied review. See *Barnes* v. *Johnson*, 528 U.S. 974 (1999).

Petitioners then filed a clemency application with the Texas Board of Pardons and Paroles, which denied the petition. See Pet. 2-3. Petitioners also sought leave to file a successor petition for post-conviction relief in the state courts, but the Texas Court of Criminal Appeals denied leave to file the petition. See Pet. 3-4.

On February 25, 2000, the United States Court of Appeals for the Fifth Circuit denied petitioners' request to file a successor federal habeas corpus petition on Barnes's behalf. See Pet. 4. Petitioners also filed an original petition for a writ of habeas corpus in this Court and applied for a stay of execution. See Pet. for Writ of Habeas Corpus as Original Matter at 3, *In re Barnes*, No. 99-8449 (filed Feb. 26, 2000). On March 1, 2002, this Court denied the petition and the application for a stay of execution. See *In re Barnes*, 529 U.S. 1001 (2000). Barnes was later executed. See Pet. App. 3a.

2. Petitioners submitted vouchers to the court of appeals in which they sought compensation for their representation of Barnes. See Pet. App. 13a-16a. The court approved payments to petitioners for fees and expenses for the period beginning with the filing of the notice of appeal and ending with the filing of the petition for a writ of certiorari in this Court, and directed petitioners to submit claims related to the clemency proceeding to the district court. See *id.* at 22a (approving payment of $6,287.50 to Wischkaemper); 6/20/00 Letter from Anthony Bonfanti, Senior Staff Attorney, to Taylor (approving $11,340.12 payment).

Wischkaemper submitted his claim for fees and expenses to the district court, which initially approved a payment of $4,995.46. See Pet. App. 6a, 23a-24a, 28a. Taylor then submitted his claim, which sought only

reimbursement for copying costs incurred during the clemency proceeding. See *id.* at 25a-26a; 2/7/01 Letter from Taylor to Deputy District Court Clerk Kristy Weinheimer. On April 9, 2001, relying on *Chambers* v. *Johnson*, 133 F. Supp. 2d 931, 935-936 (E.D. Tex. 2001), the district court entered an order in which it denied Taylor's request for compensation and reimbursement, vacated its earlier approval of Wischkaemper's fees and expenses, and directed Wischkaemper to refund $4,522.50 in fees and $472.96 in expenses. See Pet. App. 5a-7a, 28a-29a.

3. Petitioners appealed. See Pet. App. 29a. On July 20, 2001, the court of appeals dismissed the appeal for want of jurisdiction. See *id.* at 3a-4a. Petitioners moved for reconsideration. See *id.* at 31a-32a. Petitioners later filed a motion asking the court to vacate its July 20, 2001, order and to reinstate the appeal, or alternatively to clarify the procedural status of the case. See Motion to Vacate and Reinstate Appeal and in the Alternative for Clarification (Oct. 1, 2001). That motion noted that the court had asked for briefing on the jurisdictional issue in *Clark* v. *Johnson*, No. 01-10573, that the court's decision on that issue would be controlling law in the circuit, and that the previously-filed motion for reconsideration was, and was intended to be, a petition for rehearing. See *id.* at 1-4.[1]

On November 20, 2001, the court of appeals granted the motion for clarification. The court stated that it

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[1] *Clark* v. *Johnson*, No. 01-10573, involved petitioner Taylor's request for compensation for his representation of another capital habeas petitioner, Jack Wade Clark, in state clemency proceedings. The ruling of the court of appeals in that case is the subject of the petition for a writ of certiorari in *In re Taylor*, No. 01-1605 (filed Apr. 25, 2002).

was treating the motion for reconsideration as a timely petition for panel rehearing, and that all pending motions would be held pending the court's decision in *Clark* v. *Johnson*, No. 01-10573.

On January 4, 2002, following the court's decision in *Clark* v. *Johnson*, 278 F.3d 459 (5th Cir. 2002), petition for cert. pending *sub. nom. In re Taylor*, No. 01-1605 (filed Apr. 25, 2002), the court granted the motion for reconsideration, vacated its order of July 20, 2001, and reinstated petitioners' appeal. See Pet. App. 1a-2a. The court explained that, in ruling on Taylor's request for compensation in *Clark* v. *Johnson*, 278 F.3d at 460-461, the court concluded that it had appellate jurisdiction over an appeal from a district court order denying compensation under Section 848(q)(4)(B). Pet. App. 2a.

In addition, relying on its decision in *Clark*, 278 F.3d at 461-463, the court held that the district court had correctly concluded that Section 848(q)(8) did not authorize compensation for attorneys in state clemency proceedings. See Pet. App. 2a. The court therefore affirmed the lower court's order denying compensation. See *ibid.*

Petitioners filed a petition for rehearing en banc, which raised two issues: (1) whether Section 848(q) provides capital habeas corpus petitioners the right to appointed counsel in state clemency proceedings; and (2) whether, if appointed counsel has been paid for services in a state clemency proceeding, the district court may order counsel to reimburse the government. See Pet. for Reh'g En Banc 1 (filed Jan. 16, 2002). Petitioners contended that Section 848(q) obligated appointed counsel to pursue clemency proceedings (see *id.* at 4-9); that the issue was exceptionally important (see *id.* at 9-13); and that the district court's order that

Wischkaemper return the fees previously paid to him violated his right to procedural due process (see *id.* at 13-15). On February 5, 2002, the court of appeals denied the petition for rehearing. See Pet. App. 8a-9a.

DISCUSSION

This Court should deny the petition for a writ of certiorari. The principal question presented by the petition (Pet. 7-19) is whether 21 U.S.C. 848(q) provides prisoners who were sentenced to death by state courts the right to federally appointed and funded counsel in state clemency proceedings. The same issue is presented by the petition in *In re Taylor*, No. 01-1605 (filed Apr. 25, 2002), and petitioners here advance essentially the same arguments on that question as the petitioners in that case. At the invitation of this Court, the United States has filed a brief amicus curiae in *In re Taylor*, in which the government expresses the view that this Court's review is not warranted. As explained more fully in that brief, and summarized below, the Fifth Circuit has correctly held that Section 848(q) does not authorize federally appointed and funded counsel to represent state prisoners in state clemency proceedings, and its decision does not directly conflict with any decision of another court of appeals or of this Court.[2]

The additional questions presented by the petition in this case also do not warrant the Court's review. Petitioners did not raise in the court below their claim (Pet. 19-23) that Section 848(q) authorizes federally appointed and funded counsel to represent state prisoners in successor collateral review proceedings, so that claim is not properly before this Court. The contention (Pet.

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[2] The government has served counsel in this case with a copy of the amicus brief that the government has filed in *In re Taylor*.

23-25) that the district court erred by ordering Wischkaemper to repay attorneys' fees and expenses without notice or a hearing was not raised in the district court, lacks merit, and is not of sufficient general importance to warrant this Court's review. Finally, petitioners' claim (Pet. 25-29) that the court of appeals erred by initially dismissing their appeal *sua sponte* for want of jurisdiction and later affirming the district court's denial of compensation before briefing on the merits is not properly presented, lacks merit, and is too case-specific to warrant this Court's review.

A. This Court's Review Is Not Warranted To Decide Whether Section 848(q) Authorizes Federally Appointed And Funded Counsel To Represent State Prisoners In State Clemency Proceedings

As explained more fully in the government's brief in *In re Taylor*, petitioners' contention (Pet. 7-10) that 21 U.S.C. 848(q)(8) provides for federally appointed and funded counsel to represent state prisoners in state clemency proceedings is incorrect. The other provisions of Section 848(q) make clear that the statute is concerned only with appointment and compensation of counsel in *federal* proceedings, and Section 848(q)(8) must be understood in that context. In particular, Section 848(q)(8) refers to counsel appointed pursuant to Section 848(q)(4). Section 848(q)(4)(A) is implicitly limited to federal proceedings, and Section 848(q)(4)(B), the provision under which petitioners were appointed, is expressly limited to federal proceedings. Section 848(q)(4)(A) mandates appointment of counsel for indigent defendants "in every criminal action in which a defendant is charged with a crime which may be punishable by death." 21 U.S.C. 848(q)(4)(A). That provision is obviously limited to *federal* criminal actions

because it is inconceivable that Congress intended for the federal courts to appoint, and the federal government to fund, counsel in state court trials and direct appeals. Section 848(q)(4)(B) authorizes appointment of counsel to represent indigent prisoners who pursue collateral relief under 28 U.S.C. 2254 and 2255—both of which concern *federal* proceedings.

Construing Section 848(q) as limited to federal proceedings also accords with the well settled principle that "Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Jones* v. *United States*, 526 U.S. 227, 234 (1999). Petitioners' broad reading of Section 848(q) would mean that Congress, with no discussion, has, for the first time ever, authorized the federal courts to appoint, and the federal government to fund, counsel to pursue state remedies in state clemency proceedings.

A narrow construction of Section 848(q) also respects federalism principles. If federal courts were to appoint and to supervise, and the federal government were to fund, counsel to pursue state remedies on behalf of state prisoners in state courts, there would be a significant risk of federal intrusion into and interference with the state judicial process. Congress would not so dramatically alter the federal-state balance without clearly expressing its intent to do so. See, *e.g.*, *Raygor* v. *Regents of the Univ. of Minn.*, 122 S. Ct. 999, 1007 (2002). The court of appeals was therefore correct to reject petitioners' construction of Section 848(q).

Contrary to petitioners' contention (Pet. 10-13), the court of appeals' ruling does not conflict with the decision of the Eighth Circuit in *Hill* v. *Lockhart*, 992 F.2d 801 (1993). The court of appeals in *Hill affirmed* the district court's *denial* of compensation to the counsel-claimant. *Id.* at 803-804. Although the court

construed Section 848(q) to permit compensation for representation in state proceedings under certain conditions, the court was interpreting an earlier version of Section 848(q), and it is not clear that the court would reach the same result if faced with the current statute. Moreover, it appears that petitioners would not be entitled to compensation under the Eighth Circuit's approach. As far as the government is aware, petitioners did not request compensation before they represented Barnes in the clemency proceedings, and prior authorization is one of the conditions on compensation that the court established in *Hill*.

Nor does the court of appeals' decision "run[] counter" (Pet. 13) to *McFarland* v. *Scott*, 512 U.S. 849 (1994). *McFarland* did not address whether Section 848(q) authorizes federally appointed counsel to represent state prisoners in state proceedings. *McFarland* held only that a state capital defendant may invoke his right under Section 848(q)(4)(B) to appointed counsel in *federal* habeas corpus proceedings before filing a full, formal habeas petition by moving for the appointment of habeas counsel, and that a district court may enter a stay of execution to permit that invocation. 512 U.S. at 859.

B. The Question Whether Section 848(q) Authorizes Federally Appointed And Funded Counsel To Represent Prisoners In Successor Collateral Review Proceedings Is Not Properly Before This Court

Petitioners incorrectly contend (Pet. 19-23) that this Court's review is warranted to ensure that counsel is compensated for pursuing all available post-conviction remedies, including the kind of successor petitions that they filed in the underlying case. That question is not properly before this Court. Petitioners have with-

drawn any claim to compensation for representation solely related to the successor petitions that they filed. See Pet. 4-5 n.1. In addition, they have conceded that they did not seek such compensation in the courts below, and that those courts did not specifically address the issue of such compensation. See Pet. 19. In those circumstances, there is no reason for this Court to depart from its usual practice of not entertaining claims that were not pressed or passed on below. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

On the merits, the government agrees that Section 848(q) authorizes compensation for representation in connection with the filing of successive *federal* habeas corpus petitions that are arguably meritorious. For the reasons set forth above (and in the government's amicus brief in *In re Taylor*) concerning representation in state clemency proceedings, however, the government does not believe that Section 848(q) authorizes compensation for representation in connection with successive *state* petitions for post-conviction relief.

C. The District Court Did Not Commit Plain Error By Ordering That Wischkaemper Refund Fees And Expenses The Court Had Previously Incorrectly Approved

Petitioner Wischkaemper also mistakenly contends (Pet. 23-25) that the district court erred in ordering him to refund the fees and expenses that it had previously approved without first providing him notice and an opportunity to be heard. As an initial matter, that case-specific contention is not of sufficient general impor-

tance to warrant this Court's review. The claim also lacks merit.

There is no indication in either the petition or its appendix that Wischkaemper raised his procedural due process claim in the district court. Although Wischkaemper could not have raised a due process objection before the district court's action, he could have raised that claim in a motion for reconsideration, and his failure to do so means that the claim may be reviewed, if at all, only for plain error. Cf. *Conley* v. *Board of Trs. of Grenada County Hosp.*, 707 F.2d 175, 178 (5th Cir. 1983) (procedural objection to *sua sponte* grant of summary judgment is reviewed only for plain error if party against whom judgment is entered did not move for reconsideration). See generally *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941) ("Ordinarily an appellate court does not give consideration to issues not raised below."); *Dixon* v. *Edwards*, 290 F.3d 699, 719 (4th Cir. 2002) ("We should not, unless an error is plain, or unless our refusal to address an appeal would result in a fundamental miscarriage of justice, ordinarily consider an issue which is first raised on appeal."); *Fashauer* v. *New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1289 (3d Cir. 1995) ("In the absence of a party's preservation of an assigned error for appeal, we review only for plain error.").

As this Court has explained in applying the plain error doctrine in the criminal context, reversal for plain error is warranted only when the district court committed an obvious error that "affect[s] substantial rights" and that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997). That did not occur in this case.

The district court's summary procedure did not affect Wischkaemper's substantial rights. For the reasons described above and in the government's brief in *In re Taylor*, Section 848(q) does not entitle him to compensation for representing a state prisoner in state proceedings. Because Wischkaemper's claim to the money that the district court ordered him to return would have failed even if he had been accorded a hearing, the court's failure to conduct a hearing before ordering its return, if it was error at all, did not affect his substantial rights.

In addition, the procedure employed by the district court did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. It is well established that courts may modify their judgments on their own initiative. See, *e.g.*, *United States* v. *Ohio Power Co.*, 353 U.S. 98, 99 (1957) (per curiam). Further, Wischkaemper was on notice that the district court might conduct a post-audit review of his claim for fees and expenses. As the district court noted in the related *Soria* litigation, the instructions provided by the Fifth Circuit for completing worksheets to be attached to each reimbursement voucher provide that:

> All payments made pursuant to this claim are subject to post-audit; contemporaneous time and attendance records as well as expense records must be maintained for three years after approval of the final voucher. * * * Any overpayments are subject to collection, including deduction of amounts due from future vouchers.

Order to Show Cause at 2, *Soria* v. *Johnson*, Civil Action No. 4:98-CV-1067-C (N.D. Tex. Nov. 3, 2000).[3]

Wischkaemper suggests that the district court was unaware of the arguments why he was not required to refund payments received for representation in state clemency proceedings. But counsel in *Soria* v. *Johnson*, who included petitioner Taylor, provided the court with extensive argument on that issue. See Response to Show-Cause Order Relating to Attorneys Fees With Supporting Brief at 6-14, *Soria* v. *Johnson*, Civil Action No. 4:98-CV-1067-C (N.D. Tex. filed Nov. 22, 2000). If there were additional arguments to be made, Wischkaemper could have presented them to the district court in a motion for reconsideration, and he presumably did present them to the court of appeals in his petition for rehearing.

Under those circumstances, Wischkaemper is not entitled to any relief on his due process claim. Cf. *Ross* v. *University of Tex. at San Antonio*, 139 F.3d 521, 527 (5th Cir. 1998) (rejecting appellate challenge to district court's failure to provide notice before granting summary judgment because any additional evidence that might have been presented was reviewed by the appellate court and did not raise a genuine issue of material fact); *In re Weinstein*, 164 F.3d 677, 686-687 (1st Cir.) (rejecting due process challenge to bankruptcy court's *sua sponte* reversal of earlier decision where (1) aggrieved party had presented principal arguments to bankruptcy court before earlier decision; (2) aggrieved party could have raised issue in motion for reconsideration; and (3) appellate court gave full

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[3] The *Soria* litigation is the subject of the petition in *In re Taylor*, which, as discussed above, also raises the first question presented by this case, but does not raise any due process issue.

consideration to arguments), cert. denied, 527 U.S. 1036 (1999).

D. The Court Of Appeals Did Not Err In Summarily Resolving Petitioners' Appeal

Petitioners also contend (Pet. 25-29) that the court of appeals erred when it decided the merits of their appeal without permitting them to file a brief or otherwise identify the issues presented in the appeal. That case-specific contention is not of sufficient general importance to warrant this Court's review, is not properly before the Court, and lacks merit in any event.

There is no indication in either the petition or its appendix that petitioners raised that claim in the court of appeals. As a result, there is no reason for the Court to depart from its usual practice of not entertaining claims that were not pressed or passed on below. See, *e.g.*, *Zobrest*, 509 U.S. at 8; *Lovasco*, 431 U.S. at 788 n.7; *Adickes*, 398 U.S. at 147 n.2.

Petitioners' claim would lack merit even if it were properly presented. Their contention that the court of appeals acted improperly in its initial dismissal of their appeal has no bearing on the eventual judgment since the court of appeals granted panel rehearing and entertained the merits of their appeal. There is also no merit to petitioners' claim that the court of appeals erred in summarily affirming the district court on the merits after the court of appeals concluded, on reconsideration, that it had jurisdiction over petitioners' appeal. Although the court affirmed the district court's judgment without merits briefing, petitioners were able to present their views in detail to the court of appeals in their petition for rehearing. As a result, any error in the procedure followed by the court of appeals was harmless. See Fed. R. Civ. P. 61; cf. Fed. R. Crim. P.

52(a). In any event, petitioners identify no provision of the Federal Rules of Appellate Procedure that mandates merits briefing in every case. Indeed, this Court itself not infrequently decides cases without full merits briefing. See Sup. Ct. R. 16.1.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN RE: PHILIP ALAN WISCHKAEMPER
AND GARY A. TAYLOR,

Petitioners.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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SUPPLEMENTAL BRIEF

This supplemental brief is filed in response to the invited Brief for the United States as *Amicus Curiae* ("Gov.Br.").

DISCUSSION

1. For the reasons set forth in the petition and briefs in *In re: Taylor & Harris*, No. 01-1605, this Court should grant review and hold that 21 U.S.C. §848(q) requires the appointment of counsel in state clemency proceedings.

The central issue in this petition – whether 21 U.S.C. §848(q) affords a federal habeas corpus petitioner, who was sentenced to death by a state court, the right to appointed counsel in state clemency proceedings – is presented in *In re: Taylor & Harris*, No. 01-1605 (filed Apr. 25, 2002). The Solicitor General has filed its invited brief in that case, and the petitioners in *Taylor & Harris* are submitting a supplemental brief. For the reasons set out in more detail in the petition, supplemental brief, and the supporting brief of *amici curiae* in that case, this Court should grant review and hold that §848(q) provides the statutory right to counsel in state clemency proceedings for a state capital defendant who has already filed a federal habeas corpus petition. Review is necessary to resolve a clear split among the circuits. And the issue is critically important. Clemency is the failsafe in our criminal justice system; in certain circumstances, it alone can prevent a miscarriage of justice. Appointed clemency counsel is essential to meaningful clemency review.

2. The question of appointment of counsel for certain successor proceedings was raised in the district court, though the Court may consider granting, vacating and remanding in light of *Taylor & Harris*.

Petitioners Philip Wischkaemper and Gary Taylor, who were appointed for the federal habeas corpus litigation, developed evidence pointing to Odell Barnes' actual innocence. They included this evidence in Mr. Barnes' state clemency application and in successor state and federal petitions, and subsequently sought compensation for work that concurrently furthered the clemency and the successor litigation. *See* Petition for a Writ of Certiorari ("Pet.") 3-5 & n.1. Because of binding circuit authority, they did not claim compensation for work directed *solely* to the state successor litigation. Contrary to the government's suggestion (*see* Gov.Br. 8-9), the question whether §848(q) provides for counsel in state successor litigation was presented to the district court, as counsel requested compensation for concurrent clemency and successor efforts, and is properly before this Court. Nevertheless, petitioners agree that the Court need not reach the issue if it holds that clemency representation is compensable, as the petitioners should then receive relief. For that reason, it may be particularly appropriate to grant review in *Taylor & Harris* and then grant, vacate and remand for further proceedings in light of that case.

3. The procedural questions are properly before this Court and review should be granted.

The petitioners do some of the most challenging work that lawyers can do. At a time when federal courts have difficulty finding skilled death penalty practitioners

willing to accept capital appointments,[1] these lawyers were simply given the back of the hand. Under the guise of a "post-audit," which one would think is limited to correcting accounting or like errors,[2] the district court applied a new case from a different federal district (*Chambers v. Johnson*, 133 F.Supp. 2d 931 (E.D. Tex. 2001)) retroactively, and ordered petitioner Philip Wischkaemper to refund fees that had been paid to him in August 2000. *See* Pet. App. 5a-7a; United States Treasury Check No. 5697-72382568 (issued Aug. 15, 2000). The district court simply entered an order directing him to repay fees, without affording Mr. Wischkaemper notice or a hearing of any kind. By the same order, and also without notice or a hearing, the district court denied compensation to petitioner Gary Taylor. *See id.*

When the petitioners appealed, the Fifth Circuit summarily dismissed the appeal for lack of jurisdiction. *See* Pet. App. 3a. The petitioners filed their first rehearing petition[3] and pointed out that the appeal concerned an order for *repayment* of fees, as well as an order denying fees. *See* Pet. App. 32a. They asked that the appeal be reinstated and that they be permitted to file merits briefs.

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[1] *See* Supplemental Appendix, *infra* at 1a-3a (reprinting a May 27, 1999 law firm recruitment letter from twelve federal judges in Texas); Hon. Helen Ginger Berrigan, *Louisiana Lawyers Step Up to the Plate*, Fifth Circuit Civil News (Jan. 2001) (describing recruitment efforts).

[2] The instruction sheet provided by the Fifth Circuit tells counsel that their claim is subject to post-audit, and therefore tells them to keep time, attendance and expense records for three years. *See* Gov.Br. 11. The sheet reasonably signals only that their payments may be reviewed for accounting, reporting or like errors. This is in keeping with the plain meaning of "audit," which is "a formal or official examination and verification of books of account (as for reporting on the financial condition of a business . . . or on the results of its operation for a given period)." WEBSTER'S THIRD INT'L DICTIONARY 143 (1993).

[3] It was styled a "Motion for Reconsideration," but was treated as a rehearing petition. *See* Pet. App. 1a, 31a.

See id. The circuit reinstated the appeal, but then – still without allowing merits briefs – summarily affirmed the district court on the basis of *Clark v. Johnson* (*In re: Taylor*), 278 F.3d 459 (5th Cir. 2002). *See* Pet. App. 2a. The petitioners filed a second rehearing petition arguing *inter alia* that the district court's summary decisionmaking deprived Mr. Wischkaemper of due process. *See* Petition for Rehearing En Banc, *Barnes v. Johnson*, No. 01-10576 (filed Jan. 18, 2002), 13-15. Rehearing was denied.

Rather than acknowledge this appalling treatment, the government argues that the *petitioners* somehow failed to present their claims properly. Although they were not afforded the most basic elements of due process – notice or a hearing – they are somehow faulted for not making an objection in the district court, perhaps during the hearing that never took place. *See* Gov.Br. 10. Although they were not permitted to file briefs in the court of appeals, despite their specific request, they somehow erred by not reminding the court of appeals that it should give litigants the chance to identify the issues on appeal before it dismisses a case. *See* Gov.Br. 13. The government is wrong for reasons set out in more detail, below; the procedural questions are properly before this Court. The United States' argument also brings to mind Justice Black's admonition in *Hormel v. Helvering*, 312 U.S. 552 (1941), a case cited by the government:

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."

Id. at 557.

a. The petitioners had strong claims, but were not afforded a meaningful opportunity to raise them in the district court.

Contrary to the government's urging, the petitioners were not required to seek reconsideration in the district court. *See* Gov.Br. 10. The meaningful time to be heard is before a decision is made, and the petitioners were under no obligation to try to change the opinion of a judge who had already made up his mind. The case cited by the government, *Conley v. Board of Trs. of Grenada County Hosp.*, 707 F.2d 175 (5th Cir. 1983), does not stand for the proposition that a motion for reconsideration is necessary to properly preserve the issue for appeal. In *Conley*, the district court *sua sponte* granted summary judgment. The court of appeals noted that the party could simply file a direct appeal from the adverse judgment. *See id.* at 178; *see also Wright v. Hanna Steel Corp.*, 270 F.3d 1336, 1342 (11th Cir. 2001) ("An appellant is not precluded from presenting an issue for review on appeal where 'it did not need to – indeed could not – raise a challenge to the [district court's] authority . . . until the [district court] had performed the challenged act.'" (citation omitted)); *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 361 (11th Cir. 1984) (the rule requiring legal issues to be presented to the trial court "may be relaxed where the appellant raises an objection to an order which he had no opportunity to raise at the district court level."); *cf. Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 86 n.9 (1980) (a federal claim may be adequately presented "even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or reverses its prior interpretation.")

Had Mr. Wischkaemper been permitted to be heard in the district court, there is much he could have said in addition to addressing the construction of §848(q). Mr. Wischkaemper could have challenged the power of the district court to reopen his case in April 2001, eight months after he was paid for his work. The Federal Rules

of Civil Procedure, which generally apply in habeas corpus cases (*see* Fed. R. Civ. P. 81(a)(2)), do not appear to authorize the district court's actions. *See* Fed. R. Civ P. 59(d) (allowing a court to order a new trial on its own initiative, but no later than 10 days after entry of the judgment, and the parties must be given notice and a chance to be heard); Fed. R. Civ. P. 60(a) (allowing a court to correct clerical mistakes and errors arising from oversight or omission). Applying a new decision retroactively is hardly a clerical mistake or an oversight or omission. In *Dura-Wood Treating Co. v. Century Forest Industries, Inc.*, 694 F.2d 112 (5th Cir. 1982), the district court appropriately corrected an attorneys' fees award under Rule 60(a) where "the court intended one thing but by merely clerical mistake or oversight did another." *Id.* at 114. The Fifth Circuit made clear that "[s]uch a mistake must not be one of judgment or even of misidentification, but merely of recitation, of the sort that a clerk or amanuensis might commit, mechanical in nature." *Id.* (citation omitted).

Citing *United States v. Ohio Power Co.*, 353 U.S. 98 (1957), the government appears to argue that courts may modify their judgments on their own initiative for any reason at any time. *See* Gov.Br. 11. But that is manifestly not the law. In *Ohio Power Co.*, this Court vacated its earlier order, noting only that "the interest rules of finality in litigation must yield where the interests of justice would make unfair the strict application of our rules." *Id.* at 99. The case does not give all courts carte blanche to revisit prior judgments, as was made clear more recently in *Calderon v. Thompson*, 523 U.S. 538, 558 (1998), where this Court ruled that the Ninth Circuit erred in exercising its inherent power to recall its own mandate. A district court might have the inherent power or the authority under Fed. R. Civ. P. 60(a) to correct an accounting or other clerical error in the calculation of attorneys' fees, but that is hardly the same as reopening a case to apply a new substantive decision. *See Thompson*, 523 U.S. at 557 (distinguishing the recall of mandate for a new en banc vote from "the recall of a mandate to correct mere clerical

errors in the judgment itself, similar to those described in Federal Rule of Criminal Procedure 36 or Federal Rule of Civil Procedure 60(a).").

Mr. Wischkaemper might also have argued against the retroactive application of *Chambers v. Johnson*, even if the district court were found to have the power to reopen his case or conduct a "post-audit." Mr. Wischkaemper was paid for the clemency representation on August 15, 2000. As of that date, his work for the court was over. *Chambers v. Johnson*, a decision from a sister district, was not issued until March 2001. "New legal principles, even when applied retroactively, do not apply to cases already closed." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995) (citation omitted). And even if the case was not considered closed, a court has discretion not to apply a new rule of law where a party has relied upon previous law and there are significant policy justifications for not applying the new decision retroactively. *See id.* at 759. Mr. Wischkaemper could have shown that the district courts in Texas had consistently compensated lawyers for similar work and that he relied upon this practice. *See* Appendix to Petition for a Writ of Certiorari, *In re: Taylor & Harris*, No. 01-1605 (filed Apr. 25, 2002), 30a-31a. Given the shortage of qualified counsel for capital defendants in Texas (*see* Supplemental Appendix, *infra*, 1a-3a), strong policy considerations favor not applying the decision retroactively. Attorneys would rightly be reluctant to take federal habeas corpus appointments when they are at risk of losing compensation due to a change in the law after they have already rendered legal services and received payment. Thus, there is much Mr. Wischkaemper could have said, had the courthouse doors been open to him.

b. The petitioners were not allowed to file briefs in the court of appeals.

The petitioners specifically asked the Fifth Circuit to permit them to file merits briefs. *See* Pet. App. 32a. It is difficult to fault them for failing to make arguments when

they were not allowed to submit briefs. On the question whether the court of appeals can dismiss an appeal without allowing argument, briefing or an opportunity to identify the issues, the government only says that the error was harmless because the petitioners could present their arguments in a rehearing petition and because this Court "not infrequently decides cases without full merits briefing." Gov.Br. 13-14. But rehearing is disfavored in the Fifth Circuit. *See* Pet. 28. Thus, a chance to seek rehearing is in no way comparable to the opportunity to present an argument before the judges make up their minds. And though this Court occasionally issues summary reversals, the parties have at least submitted briefs at the certiorari stage, where the claims are presumably identified and presented.

Further, the rule about reaching issues not raised or addressed in the lower courts is prudential, not jurisdictional. While "*[i]n the ordinary course*, we do not decide questions neither raised nor resolved below" (*Glover v. United States*, 531 U.S. 198, 205 (2001) (emphasis added; citation omitted)), "the rule is not inflexible." *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam). This Court has noted that "there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt . . . or where 'injustice might otherwise result.'" *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (citations and footnote omitted). One such example is *Pollard v. United States*, 352 U.S. 354, 359 (1957), where the petitioner was without counsel in the lower courts and while preparing his petition for a writ of certiorari. Another is *Youakim*, where this Court remanded to consider an additional claim to avoid reaching a constitutional question. *See Youakim*, 425 U.S. at 234-36. The reasons to consider the issues in the case at bench are even more compelling than these.

c. Review should be granted.

The procedural issues are appropriately before this Court, and review should be granted. This Court should make clear to the lower courts that parties must be afforded an opportunity to be heard before money judgments can be entered and before appeals are decided on the merits. The court of appeals' decision, in particular, may be part of a larger trend towards deciding matters without full briefing. The Fifth Circuit regularly issues opinions denying certificates of appealability in capital habeas corpus cases, which results in affirmances without full merits briefing.[4] Indeed, in *Miller-El v. Cockrell*, No. 01-7662, this Court is considering whether to reverse the denial of habeas corpus relief in a case where the Fifth Circuit refused even to issue a certificate of appealability.

Alternatively, the Fifth Circuit decision should be vacated and the case remanded so that counsel can first present their arguments to the courts below. Of course, should the Court reverse in *In re: Taylor & Harris*, No. 01-1605, further proceedings on these procedural points would be unnecessary.

[4] For example, the Fifth Circuit denied certificates of appealability in Odell Barnes' habeas corpus appeal as well as the appeals related to *In re: Taylor & Harris*. *See* Pet. App. 27a-28a; *Soria v. Johnson*, 207 F.3d 232 (5th Cir. 2000); *Clark v. Johnson*, 202 F.3d 760 (5th Cir. 2000).

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the petition should be granted, the decision below vacated, and the cause remanded for further proceedings.

Respectfully submitted,

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Berkeley, California
November 2002

* Francis Martin and Sarah Ray, law students at the University of California School of Law (Boalt Hall), assisted in preparing this brief.

SUPPLEMENTAL APPENDIX

[Law Firm Form Recruitment Letter]

[Court seal] United States District Court
Southern District of Texas

May 27, 1999

[Blank]

Re: American Bar Association's Capital Habeas Recruitment

Dear [Blank]:

We invite you to meet with representatives of the American Bar Association's Death Penalty Representation Project to discuss how the project works, how your firm can participate, and how the ABA can help you. The meeting will be:

Tuesday, June 22, at 4:30-5:30 p.m.
Judges' Conference Room
United States Court House, Room 10004.

The problem arises from the more than 450 people on death row in Texas and about 40 additions annually. While we do not know what you think of the death penalty as a matter of social policy, we do know that it implicates at least two things you care about:

- The Constitution requires that the condemned have a meaningful opportunity to question his conviction and sentence collaterally, so when you help with collateral reviews, you help the Constitution as a whole.
- This court cannot reach its other work until it addresses these claims; the clearer and better grounded the presentation, the more effectively the court can do justice in these cases and in yours,

At the meeting, the ABA representatives (Attachment 1) will explain the multiple sources of truly effective assistance that will be available to your firm, including access to attorneys experienced n Texas capital habeas cases, occasional training seminars, sample pleadings, and briefing books.

Please let us know by returning the response form (Attachment 3) whether you or one of your partners will attend.

A list of the more than 40 firms recruited by the project in the past 18 months is included (Attachment 2). Several of Houston's most respected law firms already participate by representing death row prisoners in state or federal proceedings. We hope your firm will volunteer to help ensure competent representation in capital cases serving the Constitution and courts in the best tradition of American lawyers.

We look forward to seeing your firm there.

Very truly yours,

_____/s/ _____	_____/s/ _____
Carolyn D. King	Lynn N. Hughes
United States Court of Appeals	United States District Judge
_____/s/ _____	_____/s/ _____
Jerry E. Smith	David Hittner
United States Court of Appeals	United States District Judge

_____/s/ _____
Harold R. DeMoss, Jr.
United States Court of Appeals

_____/s/ _____
Kenneth M. Hoyt
United States District Judge

_____/s/ _____
Simeon T. Lake, III
United States District Judge

_____/s/ _____
John D. Rainey
United States District Judge

_____/s/ _____
Ewing Werlein, Jr.
United States District Judge

_____/s/ _____
Lee H. Rosenthal
United States District Judge

_____/s/ _____
Vanessa Gilmore
United States District Judge

_____/s/ _____
Nancy F. Atlas
United States District Judge

[Enclosures omitted]